BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	
	)	
Implementation of Section 224 of the Act	)	WC Docket No. 07-245
	)	
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
	)	

Comments of the

National Rural Electric Cooperative Association

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August 16, 2010

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EXECUTIVE SUMMARY

In this proceeding, the Federal Communications Commission seeks to implement certain recommendations contained in Chapter 6 of *Connecting America: The National Broadband Plan.* The Commission hopes to encourage greater broadband deployment in furtherance of the National Broadband Plan's goals of universal and affordable broadband for all Americans. NRECA wholeheartedly supports these goals. Our members serve the majority of the nation's rural communities, too many of which lack broadband services. Without such services, it is challenging to maintain a quality of life that equals urban areas – particularly in the areas of healthcare, education, and economic opportunities. However, NRECA cannot endorse many of the Commission's pole attachment proposals, which by and large create more burdens for utilities at the potential expense of electric system safety and reliability. While NRECA members are statutorily exempt from the Commission's pole attachment jurisdiction, any changes made by the Commission will affect electric cooperatives' relationships with attachers as well as state regulations where such regulations apply to them.

NRECA is concerned with the Commission's faulty assumption that further subsidization of cable and telecommunications companies' pole attachment expenses by utility ratepayers will "incent" those companies to deploy broadband facilities to rural and unserved areas of the country. NRECA reminds the Commission of two points overlooked in the NPRM's proposals:

First, lowering pole attachment rates and speeding the attachment process in the many areas that already have broadband will do nothing to promote broadband deployment; it would instead simply affect a wealth transfer from utility ratepayers to broadband providers' shareholders.

Second, in rural areas currently lacking broadband deployment, there is no data to support the assertion that lowering pole attachment rates will, in fact, lead to actual deployment. To the contrary, based on our research conducted this year, NRECA has reaffirmed its belief that the NPRM's proposals – which essentially shift costs from broadband providers' shareholders to utility ratepayers – will not result in broadband deployment to rural areas, even at pole rates as low as the NPRM proposes to take them, and even with the increased burdens that the NPRM proposes to impose on pole owners.

The low population density of many rural areas remains the single most significant barrier to universal broadband deployment, as NRECA has noted in previous filings and *ex parte* communications. The revenue stream necessary to make the business case is simply not there.[1] The Commission itself acknowledges the failure of market forces alone to achieve universal broadband access in both the National Broadband Plan and its recently released Sixth Broadband Deployment Report ("706 Report").[2]

Nothing in the NPRM's pole attachment proposals addresses, much less solves, these challenges. The NPRM simply concludes that because there are more poles needed to reach rural consumers, the pole attachment costs per subscriber are greater in rural areas. From this unavoidable and inherent cost differential, the NPRM then leaps to the illogical conclusion that the solution is to lower pole attachment rates and to place new costly obligations on pole owners to speed up pole attachment deployments. In other words, the inherently and unavoidably higher costs of broadband deployment in rural areas must be borne entirely on the backs of electric utility consumers. The only certain outcome from the adoption of the NPRM's pole attachment rate and access proposals is to have electric utility consumers bear more of the attaching entities'

[1] National Broadband Plan at ¶ 136.
[2] FCC, Sixth Broadband Report (adopted July 16, 2010) ("706 Report").

costs of doing business – whether or not those utility ratepayers want broadband service or will ever be provided with such services.

If the Commission wants to further a federal policy of promoting broadband deployment by subsidizing deployment costs, it should do so through a federal broadband grant program and/or a federal Universal Service Fund ("USF") type subsidy program. A USF type program would be specifically designed to ensure that service providers can economically provide comparable services to both low-cost and high-cost consumers. The Commission should *not* look to lower the unavoidably higher costs to serve rural areas by requiring electric utility ratepayers to subsidize that deployment.

NRECA applauds the NPRM's proposals that seek to address some of the legitimate concerns of utilities regarding electric system safety and reliability. In particular, NRECA supports allowing utilities to impose penalties for unauthorized attachments. Notably, these penalties impose no additional burdens on attachers; they merely deter service providers from the all too common practice of making unauthorized attachments to utility poles. Unfortunately, many of the NPRM's other proposals place unnecessary burdens on utilities to speed up attaching entities' access to utility infrastructure – without concomitant protections for that infrastructure and due recognition of the primary purpose for which it was designed and built. Electric utilities are legally obligated to provide consumers with safe and reliable electric service at just and reasonable rates. Establishing a more comprehensive timeline for the attachment process that has appropriate "off ramps" and exceptions would help ensure utilities will be able to appropriately focus on their core mission. Similarly, giving utilities options, rather than mandates, to perform more administrative and data gathering functions for attachers, would prevent undue diversion of utility resources.

INTRODUCTION

The National Rural Electric Cooperative Association ("NRECA") appreciates this opportunity to comment in response to the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking ("NPRM") aimed at (1) expediting access to utility poles by telecommunications and cable companies, (2) making attachment rates lower and more uniform, and (3) improving the pole attachment enforcement process.[3]

NRECA is the national service organization for more than 900 not-for-profit, rural electric utilities that provide electric energy to approximately 42 million consumers in 47 states. Rural electric cooperatives ("Electric Cooperatives" or "Electric Co-ops") serve 18 million businesses, homes, schools, churches, farms and other establishments and account for about 11 percent of all kilowatt-hour sales of electric energy in the United States. The median Electric Co-op has 12,941 consumers. Electric Cooperatives own and maintain 2.5 million miles or 42 percent of the nation's electric distribution lines, which traverse approximately 75 percent of the nation's land mass.

While 47 U.S.C. § 224(a)(1) of the Communications Act ("the Act")[4] expressly exempts electric cooperatives from the FCC's pole attachment jurisdiction, NRECA is nevertheless compelled to respond in the NPRM due to the direct and indirect impacts that the NPRM's proposed rules may have upon Electric Cooperatives. In pole attachment agreement negotiations with non-regulated Electric Co-ops, cable television ("CATV") and telecommunications attachers often argue that the Commission's pole attachment requirements establish benchmarks or serve as a *de facto* model by which Electric Co-op rates and practices should be measured which may result in contentious and protracted negotiations. Further, in some states, Electric

[3] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future,* WC Docket No. 07-245, GN Docket No. 09-51 (rel. May 20, 2010), 75 *Fed. Reg.* 41,338 (July 15, 2010) ("NPRM").
[4] 47 U.S.C. § 224, *et. seq.*

Cooperatives are subject to pole attachment regulations promulgated by a state public utility commission, which in turn may follow FCC pole attachment rules. NRECA expects that any changes adopted by the Commission will trickle down, or at least invite a reexamination of existing pole attachment rules applicable to Electric Cooperatives at the state level.

Additionally, NRECA believes the Commission would benefit from learning of the results of our research concerning pole attachments that was conducted earlier this year. This research confirmed that Electric Cooperatives' pole attachment practices overall are very reasonable and conducive to providing interested parties with timely access to poles at reasonable, cost-based rates. Our findings also identified inaccuracies in several of the assumptions upon which the NPRM's proposed rule changes are based. Further, NRECA's members also reported a number of practices by CATV companies and telecommunications providers that raise serious and often costly and time-consuming problems for utilities. These issues are in addition to the safety and system reliability concerns that NRECA has previously noted and that the Commission has made some attempts to address (albeit, inadequately) in its NPRM.

DISCUSSION

I. THE COMMISSION'S "NEED FOR SPEED" MAKE-READY PROPOSALS MUST BE BALANCED WITH THE NEED TO ENSURE SAFE AND RELIABLE DELIVERY OF ELECTRIC SERVICES.

A. *Proposed Timeline for Section 224 Access.*

NRECA conducted a survey of its members earlier this year to determine the current state of Electric Cooperative pole attachment practices.[5] In that survey, we sought to determine,

[5] NRECA Market Research conducted a pole attachment survey in April 2010, with a brief follow-up survey to respondents in July. 600 Electric Cooperatives responded to the April survey (a 76% response rate) and 324 responded to the follow-up survey (a 42% response rate). The full survey report is considered proprietary.

among other things, the average length of time it takes for an Electric Co-op to respond to a request to make an attachment. Remarkably, the average number of days from the Electric Co-op's receipt of the attachment request to approval was a mere 12 days. From approval to actual installation of the attachment, the average length of time reported was 22 days, with only 10% of responding Electric Co-ops reporting that this step would likely take more than 30 days. Some Electric Cooperatives indicated that the time frame could extend much longer, however, as long as a few months. When asked why the make-ready step could become protracted, the two reasons cited overwhelmingly were factors beyond the Electric Co-op's control: (1) not receiving all the information necessary from the requesting attacher (67% of responses) and (2) not receiving cooperation from existing attachers to relocate their attachments (47% of responses).[6] NRECA does not believe the record establishes the need for a strict timeline. However, if the Commission feels compelled to adopt one, the timeline must be more flexible, particularly in the latter stages where circumstances beyond the pole owner's control can delay the completion of the work. As invited by the Commission, NRECA addresses specific questions posed in the NPRM with regard to the timeline proposals:

- *Should the Commission clarify what constitutes a sufficient request to trigger the timeline? Yes.* Because many Electric Cooperatives reported difficulties in receiving necessary information from those requesting attachments, NRECA has to believe that investor-owned utilities ("IOUs") often encounter the same problems. Therefore, the Commission should require that a pole attachment request contain all the pertinent information necessary for a utility to adequately assess the feasibility of the attachment before the timeline is triggered. At a minimum, application information

[6] Multiple responses were possible for this question.

should include a detailed description of each and every one of the proposed attachments, the attacher's build out plan identifying proposed timing and locations, and drawings of attachment construction and installation specifications and related equipment including necessary guys, anchors and drop/lift poles.

- *Should significant errors in a pole attachment application request justify stopping the clock? Yes.* Utilities cannot be expected to be mind readers. When information supplied by the attaching entity proves to be in error, then utilities should not be expected to comply with a strict timetable. Attaching entities must provide complete and accurate information.
- *Should the Commission extend the obligation to complete make-ready work in this timeframe to existing attachers? Yes.* As noted above, 47% of Electric Cooperatives reported difficulties with timely relocations of existing attachments as a primary reason why the make-ready stage can become time consuming in some instances.
- *Should the Commission consider alternative or additional policies that could ensure the cooperation needed as part of the make-ready process? Yes.* NRECA believes the FCC should consider authorizing utilities to impose a penalty on existing attachers for unreasonable delays in coordinating rearrangement of existing attachments to accommodate a new attachment. Alternatively, penalties that would be levied against utilities for failing to meet the timeline should be passed through to the existing attacher responsible for the unreasonable delay.
- *Should the Commission make any necessary adjustments or exclusions to the timeline? Yes.* As a general matter, NRECA typically opposes "one size fits all" requirements when it comes to the pole attachment process, because such

requirements often have a disproportionately adverse impact on smaller entities. Moreover, any "one size fits all" approach necessarily ignores the immense variability in facts and circumstances of each utility and each attachment request. Altering the timeline based on the size of the utility or the size of the request would seem appropriate in instances where adhering to the timeline would create an undue burden on the utility and a diversion of the utility's resources that should be primarily directed to the utility's core mission of providing safe and reliable electric service. Similarly, allowing for some adjustments to allow adequate time to make pole modifications (e.g., to address newly discovered safety violations or to bring a pole into compliance with current standards), is reasonable and appropriate. The NPRM does not address how the timeline will be adjusted, if at all, in the event of contemporaneous attachment requests. Utilities have no way to predict when or how many pole attachment requests they may receive at any time. Handling multiple, simultaneous pole attachment requests may be particularly challenging for smaller utilities with less staff. Further, NRECA believes that the Commission should allow utilities and attaching entities to contractually agree to deviate from the timeline.

- *Would guidelines be necessary or helpful for determining when it is appropriate to stop the clock from meeting the timeline requirements? Yes.* NRECA believes that guidance would be helpful to both utilities and attaching entities to know some of the types of circumstances that would stop the clock. Because the Commission is not likely to be able to accurately predict all the various circumstances or scenarios that would justify stopping the clock, NRECA recommends that the Commission emphasize that the guidelines are just that, guidelines, and not a finite list of the only

permissible justifications for deviating from the timeline.

B. Use of Contractors.

NRECA's survey found that 58% of Electric Cooperatives reported that cooperative employees complete all make-ready work. Another 23% reported that some combination of Electric Cooperative employees and attaching entity employees or contractors perform make-ready work. While NRECA applauds the Commission for recognizing that utilities have legitimate concerns about the qualifications of the contractors performing make-ready work and installing pole attachments, NRECA strongly disagrees with the NPRM's suggestion that "a utility's concerns are less pressing" when attachments are ready to be installed than at the make-ready phase. NRECA explored this issue in its survey, asking its members about negative impacts that attachments may have on electric system reliability. About 73% of Electric Cooperatives reported that pole attachments had some negative impact on reliability. When asked about the specific causes of those negative impacts, 55% of Electric Cooperatives cited improper installation or maintenance of attachments.[7] Requiring utilities to accept that contractors perform the work can only exacerbate that problem.

NRECA also strongly disagrees with the NPRM's proposal to require utilities to shoulder all the burden of "certifying" the credentials of outside contractors and publishing a list of "approved- and certified contractors that the utility itself uses." "Certify" means: "to recognize as having met special qualifications (as of a governmental agency or professional board) within a field."[8] In addition to the time and expense and potential liability exposure associated with complying with such certification activities, a utility is likely to evaluate who it will use *for its*

[7] Multiple responses were possible. Other responses given included: improper guying and tension methods (70%) and safety code violations (61%).
[8] Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/certify (last visited Aug. 12, 2010).

own work based on a contractor's demonstrated ability to perform *electric* work safely and competently. However, OSHA standards for electric line work and telecommunications line work are two separate sets of standards.[9] Every utility may not have the ability to sufficiently judge the qualifications of a contractor that primarily performs telecommunications work so as to be able to "certify" the contractor's qualifications. NRECA can foresee great potential for arguments arising when attachers want to dispute the utility's understanding of the contractor's qualifications or approval criteria, or when attachers disagree with the utility's determination not to include a particular contractor on the "approved" list.

The NPRM's proposal to provide for "joint" direction and supervision of contractors seeks to address legitimate utility concerns with the quality of the work being done, but it introduces other concerns. First, as noted above, NRECA does not understand why the NPRM draws a distinction between survey and make-ready work, on the one hand, and attachment installations, on the other. This simply makes no sense, particularly when the NPRM states that the Commission intends to have the pole owner exercise "final authority to make all judgments that relate to insufficient capacity or safety, reliability, and sound engineering."[10] Such judgment calls are not limited to the survey and make-ready phases; they are equally necessary in the attachment process itself.

As a practical matter, NRECA is skeptical of how diligently attachers will comply with the obligation to invite utility representatives to accompany contractors when work is to be performed. As is discussed below, problems with unauthorized attachments are a serious – and for many utilities, extensive – problem. If attachers are obligated now to notify utilities before they attach yet fail to do it, then it seems little more than wishful thinking to believe that

[9] Electric Power Generation, Transmission, and Distribution Standards are found at 29 C.F.R. Part 1910.269. Telecommunications standards are found at 29 C.F.R. Part 1910.268.
[10] NPRM, 75 *Fed. Reg.* 41,343 at ¶30.

attachers will actually extend the required invitation so that the utility can jointly direct and supervise the work. What penalty results if the attacher fails to extend the invitation? Further, it is not clear that a utility would always want to accept such an invitation when the ability to control the work to this degree would mean that the utility may be exposing itself to greater risk of liability (e.g., negligent supervision).

Moreover, the inherent contradiction in the NPRM's proposals bears emphasizing: satisfying the new "shot clock" deadlines and oversight obligations will increase utilities' costs, at the same time that the NPRM proposes to lower attachment rates. The Commission cannot have it both ways. NRECA believes that the Commission should consider explicitly authorizing utilities to conduct a post-deployment, final acceptance inspection of the attachments to ensure compliance with the initial plans and all appropriate safety, reliability, and sound engineering practices, and to assess penalties against attachers for non-compliant work.

The most recent 706 Report numbers would indicate that the bulk of the nation's broadband infrastructure has already been successfully deployed. Deployment to date has occurred with some combination of third party contractor, attacher and utility workforces. It bears repeating that rural broadband deployments are not taking place because there is often no business case to expand broadband into certain, less populated areas. Squabbles over whose workers will perform the work are secondary.

C. Wireless Attachments – Working among electrical lines.

NRECA agrees with the Coalition of Concerned Utilities ("Coalition") that "Placing wireless antennas on pole tops above energized electric facilities raises a host of safety, reliability and engineering concerns and requires much more careful analysis than wireline

attachments in the communications space."[11] NRECA does not believe that the Commission has before it sufficient information at this time to move forward on the NPRM proposals related to wireless attachers. Indeed, utility pole owners, including Electric Cooperatives, do not have enough practical experience with wireless attachments, including pole-top attachments.[12] The Commission should not simply rely on the self-serving assertions of wireless service providers to make judgments that may endanger the lives of utility workers and others and potentially jeopardize electric system reliability. The requirement that work among the lines be accomplished "…in concert with the utility's workforce and when the utility deems it safe"[13] needs further clarification. Until more information is gathered and more practical experience with wireless attachments is gained in the field, it is unreasonable to require utilities to permit contractors on their poles based on a wireless provider's bare assertion that the contractor has "specialized communications-equipment training or skills that the utility cannot duplicate to work among the power lines."

NRECA summarizes its positions on the provisions in the NPRM addressing the use of contractors as follows:

- *Does the Commission's proposal [to require utilities to approval and certify contractors] strike the right balance of rights and burdens of attachers and utilities?* *No.* NRECA does not believe that utilities should be forced into the contractor "certification" business or that electric consumers should have to assume the additional costs and liability risks that would entail. Instead, NRECA suggests that the Commission should require attachers to develop and submit to the utility for

[11] Letter from Thomas Magee, Coalition of Concerned Utilities, to Chm. Coops, Commrs. Adelstein and McDowell, FCC, GN Docket No. 09-29, WC Docket No. 07-245 (May 1, 2009) at 14.
[12] NRECA's survey found that only 7% of the types of attachments reported by responding Electric Cooperatives were made by wireless service providers.
[13] NPRM, 75 *Fed. Reg.* 41,343 at ¶32.

approval a list of contractors that the attacher would propose to use, together with a description of the training or certification qualifications of each proposed contractor.

- *Does the Commission's proposal [to require attachers to invite utilities to jointly direct and supervise contractor's survey and make-ready work, but not actual attachment installations] strike the right balance of rights and burdens of attachers and utilities? No.* While NRECA commends the Commission's attempt to address legitimate reliability and safety concerns, the NPRM unduly tip the scales with greater rights for attachers and more burdens for utilities. Instead, NRECA suggests that the Commission consider requiring attachers to notify utilities whenever contractors will be performing any work (survey, make-ready and installation) and giving the utility the ability to penalize the attacher for failure to provide such notifications. Further, NRECA suggests that utilities and attachers should be able to negotiate the respective rights and obligations of the parties for outside contractor work.
- *Does the Commission's proposal [to require utilities to permit contract personnel with specialized communications-equipment training or skills that the utility cannot duplicate work among the power lines] strike the right balance of rights and burdens of attachers and utilities? No.* NRECA believes that more information about and experience with wireless attachments is needed before any such requirements should be considered. As discussed above, this proposal imposes undue safety and reliability risks.

D. Payment for Make-Ready Work.

The NPRM proposes to adopt the "Utah rule" that would require payments for make-

ready work in stages to "correctly align the incentives to perform make-ready work on schedule."[14] The NPRM, however, fails to identify anything in the record to indicate that the current "incentives" are somehow out of alignment. In short, the NPRM's "Utah rule" proposal is a solution in search of a problem – and one that would simply impose another wealth transfer from utility ratepayers to broadband providers' shareholders. NRECA's survey revealed a fairly even split among its members in those requiring upfront payments (59%) and those that did not require any upfront payment (41%). NRECA is not aware of any significant problems arising in its members' pole attachment contract negotiations regarding the timing of make-ready work payments.

- *Should the Commission adopt a general rule permitting payment for make-ready work in stages, and leave the details of the specific payment schedule to negotiation? No*. NRECA sees no reason why the parties cannot agree on a mutually acceptable payment schedule. There is no justification for the Commission to place the heavy hand of regulation on the scales with a general or "default" rule of staged payments.

E. Schedule of Charges.

- *Should the Commission require utilities to make available a schedule of "common" make-ready charges? No.* NRECA does not believe that such a schedule of "common" charges is practical for several reasons, including: (1) specific fees charged will vary depending on the requirements of each make-ready job; (2) there are few "common," charges except perhaps for hourly labor rates for utility workers; and (3) materials costs that are passed through to the attacher are set by the materials supplier, not the utility. What may be more feasible is to describe how charges are

[14] NPRM, 75 *Fed. Reg.* 41,343, at ¶ 33.

calculated (e.g., flat rate, hourly labor rate multiplied by number of hours worked, pass-through of equipment or materials costs from utility's supplier, etc.). Moreover, this seems to be another instance in which there is no evidence of a significant problem warranting new regulation.

F. Utility as "Clearinghouse" for Payments between Attachers.

- *Should the Commission require the utility, as the entity having "privity" with both the requesting entity and existing attachers, to be responsible for managing the transfer of funds between the attachers for make-ready expenses? No.* NRECA does not believe that the utility should be forced to act as the payment clearinghouse between existing and new attachers. Requiring utilities to devote staff time and resources to handling cost estimates and payments – and potentially diverting focus from other, more central aspects of the pole attachment process – would be counterproductive to the Commission's objectives. Such a requirement also would be particularly burdensome for smaller utilities that may have a relatively small accounting staff.[15] If a utility voluntarily wants to assume such responsibilities, then the parties can contractually agree to such an arrangement. Otherwise, the NPRM's proposal is yet another shifting of costs and risks from broadband providers' shareholders to utility ratepayers.

G. Improving the Availability of Data through Creation of Pole Inventory Database.

The NPRM seeks to determine how to improve the collection and availability of information regarding the location and availability of poles, ducts, conduits, and rights-of-way.

[15] For instance, many Electric Cooperatives outsource some portion of their electric consumer billing, payment and collections processes.

The NPRM references the National Broadband Plan's suggestion that the hundreds of entities that want access to this infrastructure need accurate information about it to "efficiently and timely deploy advanced and competitive communications networks."[16] The National Broadband Plan does not, however, make reference to any significant number of attaching entities identifying that a current problem exists in obtaining such data. Indeed, this seems to be a concern being voiced only by FiberTech Networks, LLC and Kentucky Data Link, Inc.[17] Again, the NPRM is presenting a solution to a problem that does not really exist, or if it does exist, is limited and does not warrant the time, burden and expense associated with implementing the NPRM's proposed solution of a new, national inventory system. Ascertaining the availability of infrastructure to aid in the deployment of a broadband project should remain a simple question of due diligence to be conducted by the service provider, not the infrastructure owner. Again, this burden and expense apparently would be borne mostly by utilities and their consumers for the benefit of broadband providers and their shareholders.

As the NPRM notes, centralized inventories already exist, such as the National Joint Utilities Notification System ("NJUNS") and Alden Systems' joint use inventory and related services.[18] The utilities – including a number of Electric Cooperatives – and attaching entities that find such centralized services desirable can choose to use them. NRECA does not believe the Commission should seek to establish a new regulatory scheme that would supplant private competitive services that appear to be functioning perfectly well.

NRECA summarizes its positions related to the NPRM proposals to enhancing the information available to attachers on available utility infrastructure:

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[16] NPRM, 75 *Fed.Reg.*41,344 at ¶ 38, is referencing The National Broadband Plan at 112.
[17] See, e.g., "Comments of FiberTech Networks, LLC and Kentucky Data Link, Inc.," Report on Rural Broadband Strategy and Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments (filed March 25, 2009).
[18] NRPM, 75 *Fed.Reg.* 41,344 at ¶ 39.

- *Should the Commission collect data [on the location and availability of poles, ducts, conduits, and rights-of-way] itself, or might industry, including third-party entities, be better suited for the task? No.* NRECA does not see why the Commission should seek to supplant existing services like NJUNS or Alden Systems to collect data that only a few parties complain is not readily available to them.
- *How can [the Commission] ensure participation by all relevant parties, including timely updates of information?* The Commission is aware that its jurisdictional reach is limited. Therefore, the Commission cannot mandate that relevant parties outside its jurisdiction participate in an FCC database. Additionally, ensuring timely information in a national database would likely be a difficult task. Just among Electric Cooperatives, our research shows that the frequency of Electric Co-op's pole and attachment inventories varies.[19]
- *How can [the Commission] ensure that the costs are shared equitably by pole owners and other users of the data?* Such a national database would largely benefit attachers, not utilities. Utilities will have the information they need about what attachments are on their poles by conducting inventories, as they already do. There is no further benefit to them to have to prepare this data for inclusion in a database. Therefore, truly equitable allocation of costs would dictate that those that would benefit from such a database – attachers – should pay for all of the costs associated with it.

[19] While a small percentage (8%) of Electric Co-ops make annual inventories, 16% reported inventories taking place every two or three years, 42% reported they were on a five-year inventory cycle, and the remaining 34% inventoried according to some other schedule. The frequency of inventorying varies based on a number of factors, including applicable state or local requirements and cost.

II. THE NPRM'S ENFORCEMENT PROPOSALS MUST BE EVEN-HANDED AND NOT FAVOR ATTACHERS AT THE EXPENSE OF UTILITIES.

A. Compensatory damages.

The NPRM proposes to subject utilities to compensatory damages for wrongful denial of access or delays in granting access to poles or for subjecting attachers to unjust and unreasonable terms or conditions. The proposal is flawed on several levels. First, the FCC has no legal authority to require utilities to pay compensatory damages to attachers for violations of its pole attachment rules.[20] Second, the Commission is an ill-suited body to perform the detailed fact-finding necessary to adjudicate compensatory damage claims. Third, calculating compensatory damages, if any, suffered by attachers from a utility's violation of the Commission's pole attachment rules is an inherently, and impermissibly, speculative proposition. Fourth, the assumption underlying the NPRM's compensatory damages proposal – attachers must be made "whole" – while the balance of the NPRM makes proposals that will increase utilities' costs and, at the same time, lower pole attachment rates – is grossly one-sided.

B. Unauthorized attachment penalties.

NRECA was disappointed to see that the NPRM expresses doubt regarding the extent to which unauthorized attachments are a significant problem for utilities. The NPRM overlooks the fact that even though the magnitude of the unauthorized attachment problem may vary from one

[20] The NPRM (at ¶¶ 86-87 & n. 235) cites no authority in Section 224 or elsewhere in the Act that would empower it to impose compensatory damages on utilities and award them to attachers, nor are we aware of any. The only provisions of the Act giving the Commission authority to assess damages, Section 206 and 207, apply only to telecommunications carriers. Moreover, even if those provisions could be construed to reach utilities subject to Section 224 (and they cannot), the law is clear that those provisions only permit damages claims for violations of the Act, *not* for violations of Commission rules, *see* P. Huber, M. Kellogg & J. Thorne, *Federal Telecommunications Law* § 3.14.3 (2d Ed. 1999), and any violations under the NPRM's proposal would be of Commission rules, not Section 224 itself. Further, even in the case of damages claims against carriers under §§ 206 or 207, damages are limited to refund of rates; they do not include other categories of compensatory damages. *See Conboy v. AT&T Corp.*, 241 F.3d 242 (2d Cir. 2001). *Cf. FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 24 (1968) (FPC "has no reparation power").

utility to another, this does not make the problem a "non-issue." Indeed, it is just this troubling frequency of failing to comply with attachment practices by some attachers that warrants Commission action.

NRECA asked its members for current information on unauthorized attachments in its recent survey. An overwhelming majority – 87% of responding Electric Cooperatives – reported finding unauthorized attachments. In NRECA's follow-up survey, we sought to establish how prevalent a concern unauthorized attachments are for our members. There was considerable variance in the number of such attachments reported by Electric Cooperatives.[21] The range of unauthorized CATV attachments reported was between 1 and 23,000, with a mean average of 1,026. The number of unauthorized telephone company attachments reported ranged from 2 to 28,000, with a mean average of 1,240.

The NPRM seeks input regarding whether the Commission should look to adopt a system akin to the one adopted by the Oregon Public Utilities Commission (Oregon Commission) to respond to problems reported by utilities with unauthorized attachments.[22] The Oregon Commission's rules set penalties of $500 per pole, per year, for attachment of facilities without an agreement, and, for attachments without a permit, $100 per pole plus five times the current annual rental fee per pole.[23] The Oregon Commission's rules also establish a system to alert and give attachers an opportunity to correct violations.

NRECA asked its Electric Cooperative members in Oregon, which are subject to these rules, for their impressions of how well the system was functioning. The Oregon Electric Co-ops reported that these rules provide helpful structure and guidance for resolving pole attachment issues. This system has been in place for about 10 years now, and in our members' experience,

[21] 324 Electric Cooperatives responded to NRECA's July follow-up survey.
[22] Or. Admin. R. 860-028-0130 – 860-028-0220 (2010).
[23] Id. 860-028-0130 & 860-028-0140.

penalties are now rare. This seems to indicate that the system is functioning as intended – deterring attachers from making unauthorized attachments. The deterrent effect will be more important, if, in fact, unauthorized attachment violations increase with an escalation in broadband deployment.

- *Should the Commission adopt the Oregon standards as presumptively reasonable penalties for unauthorized attachments?* Yes. NRECA believes that based on what it has learned from the experience of Oregon Electric Cooperatives, the Oregon Commission's rules addressing unauthorized attachments are presumptively reasonable.
- *Should there be a threshold number of unauthorized attachments necessary before penalties apply? No.* NRECA does not believe that there should be a minimum threshold for the application of penalties for unauthorized attachments. By definition, an attacher acting without authorization has been improperly enjoying the benefits of attaching without compensation to the pole owner, and potentially creating unknown safety hazards. The utility that owns the pole that has been used by the unauthorized attacher is entitled to compensation for the use of that space. Unauthorized attachers need some inducement to engage in safe work practices and account for their attachments. The experience of NRECA's Oregon members demonstrates that when attachers face a financial downside for engaging in risky or irresponsible behavior, they respond appropriately by reducing unauthorized attachments.

  It is unclear why the Commission is even considering establishing such a minimum threshold. Perhaps the Commission is inclined to give attachers a break if the number of unauthorized attachments is small. The Commission, however, should

not lose sight of the fact that even a single unauthorized attachment can pose a safety hazard that endangers line workers and the general public. Under the Oregon Commission's rules, the pole owning utility's recovery is limited to five years of "back rent" plus a specified sanction, with a "safe harbor" to avoid the sanction if the attacher self-reports the unauthorized attachment.[24] Following the Oregon approach of allowing attachers to avoid the sanction for self-reporting unauthorized attachments is preferable to setting a trigger threshold for the application of penalties.

- *How could the Oregon standards be enforced – through provisions in pole attachment agreements, through the complaint resolution mechanism in section 224 of the Act, or through both?* An interim step to a formal complaint should be considered. Elsewhere in the NPRM, input is sought regarding the role of alternative dispute resolution ("ADR").[25] The Oregon Joint Use Association provides an alternative forum and informal process for the airing of complaints that allows the parties to further establish the facts and test the validity of their positions before proceeding with a formal complaint. NRECA's Oregon members have expressed their support for this form of ADR. NRECA believes that smaller utilities, in particular, can benefit from enforcement mechanisms other than formalized complaint procedures. Formalized procedures can be protracted and expensive, which can be a significant deterrent to utilities bringing such complaints.

C. Unsafe attachments are also prevalent and may be deterred through a similar penalty system.

NRECA believes the Commission would be remiss in engaging in such a wholesale rewrite of its pole attachment rules without giving due consideration to ways it might remedy the

[24] Or. Admin. R. 860-028-0130 & -0140 (2010).
[25] NPRM at ¶ 43.

problems associated with unsafe attachments that have been identified by utilities. By unsafe attachments NRECA is referring to attachments that are installed in an unsafe manner, attachments that do not meet applicable safety code requirements, and attachments that become unsafe because of poor maintenance. NRECA's survey found that it is an all too common occurrence for poorly installed or maintained attachments on Electric Co-op poles to result in accidents that cause property damage or personal injury. A full one-third of survey respondents reported having experiencing pole attachment-related accidents that resulted in property damage to the cooperative or others, and 7% reported experiencing accidents that caused personal injuries, including some resulting in a fatality. Thirty percent of Electric Cooperatives responding to NRECA's follow-up pole attachment survey reported having had one or more safety-related pole attachment accidents occurring in the past 12 months.

These photographs provided by Graham County Electric Cooperative in Arizona show an accident caused by a tractor trailer coming in contact with a communications attachment that did not meet the required safety code clearance:

This accident caused a power outage lasting several hours, damage to other vehicles near the scene of the accident, and damage to Electric Cooperative infrastructure:

It takes time and effort by utility staff to address unsafe attachments that are discovered on their systems to prevent accidents from occurring. NRECA's follow-up survey asked Electric Cooperatives how many times in the last 12 months the cooperative had acted to correct or require attachers to correct their unsafe attachments. Of the 98 Electric Co-ops that reported having to take action to correct or remove an unsafe attachment in that time period, the number of attachments that needed correction ranged from one to 4,000. Of the 144 Electric Co-ops that reported that required attachers to correct or remove unsafe attachments, the number of attachments that were removed or corrected by the attachers ranged from one to 10,000. Overall, 36% of responding Electric Cooperatives reported that the cooperative corrected or removed an unsafe attachment 10 or more times, and 45% reported that they required an attacher to correct or remove an unsafe attachment 10 or more times, in the past 12 months.

III. NRECA CONTINUES TO BELIEVE THAT THE NPRM'S POLE ATTACHMENT RATE PROPOSALS ARE ILL CONCEIVED TO ACHIEVE ITS STATED PURPOSES OF PROMOTING BROADBAND DEPLOYMENT.

A. NRECA's survey data confirms that low pole attachment rates do not result in more attachments to provide advanced services in rural, sparsely populated areas.

NRECA's research proves what the association has maintained for a long time: that Electric Cooperatives charge fair, cost-based rates for pole attachments. NRECA's pole attachment survey also shows that low pole attachment rates do *not* make it more likely that attachments will made in sparsely populated areas. First, it is necessary to put Electric Cooperative pole attachments and rates in some context. Electric Cooperatives use various cost-based methodologies to set pole attachment rates: 17% of Electric Cooperatives voluntarily follow the FCC's rate formulas, 47% use a formula or formulas of their own design; 20% follow a methodology from their statewide association of Electric Cooperatives[26]; and 15% still use an old Rural Electrification Administration ("REA") formula. Fifty-three percent of Electric Cooperatives charge rates on a per pole basis, while 39% charge on a per attachment basis (though in many instances, there is no real difference in the rate structure as applied because there is only one attachment per pole).

For Electric Co-ops that charge on a per pole basis and charge the same rate regardless of the type of attachment, the average annual rate charged as of December 31, 2009 was $10.38. For those that charge different rates for different types of attachments, the average CATV rate charged was $9.93 and the average telecommunications rate charged was $15.54. When NRECA compared the average per pole rates charged against the type of rate formula used, it found that the median average rate of Electric Co-ops using the FCC's formula was $13.33 compared to Electric Cooperative's own, internal formulas, which generated a median average rate of $11.38.

On the survey, NRECA asked its members a preliminary question of whether they had any pole attachments on their systems, and 66 Electric Cooperatives reported that they did not.

[26] NRECA is aware of a number of statewide organizations that, in an effort to assist cooperatives and help them avoid contentious negotiations and litigation, have devised a rate formula, typically with the support of attaching entities in that state or their state trade organizations.

When these Electric Co-ops were asked why this was so, 46% responded that they had never been approached by a service provider to attach to their poles.[27] The majority of Electric Cooperatives that reported having pole attachments were asked whether the attaching entities provided broadband services in their electric service territories, and 78% said yes. But when asked if these providers served the Electric Cooperative's entire service territory, 90% said no, with 78% responding that it was the rural (not suburban or urban) areas of their service territories where attachers did not provide broadband services. NRECA asked those Electric Cooperatives *with* attachments on their poles why they believed they did not have more of their poles did not have attachments on them: 95% reported not having received requests to attach; 51% reported that the poles were not attractive to communications providers because they were in a sparsely populated area; and 36% responded that the poles were on lines that did not serve a residence or business likely to need communications services.[28]

NRECA then compared the consumer density – that is the number of consumers per mile of electric distribution line – of the Electric Cooperatives that responded to the survey with the average annual rates they charged per pole. NRECA found that ***the lowest pole attachment rates charged were for those Electric Cooperatives that average fewer than four consumers per mile of line.*** The average per pole rates for these Electric Cooperatives serving in these most sparsely populated areas of the country were $5.50 (median) and $6.33 (mean).[29] This data clearly shows what NRECA hopes the Commission will recognize – low pole rates, even rates as low as the NPRM seeks to achieve – are not enough to promote broadband deployment. There are simply

[27] Another 36% reported that service providers had their own infrastructure and thus did not need access to Electric Co-op poles.
[28] Multiple responses were possible to this survey question.
[29] It should be noted that many poles in rural areas, barring weather or terrain considerations that would require a sturdier pole, are shorter and smaller in diameter than poles in urban and suburban areas. Thus, such poles are often less expensive than those taller, larger poles used in other areas.

not enough consumers who can generate sufficient revenue to make it attractive for broadband service providers to deploy in these areas in these very low density areas. The National Broadband Plan established that, "the data show that rural areas are less likely to have access to more than one wireline broadband provider that other areas"[30] and "most areas without mobile broadband coverage are in rural or remote areas."[31] The Commission's most recent 706 Report correctly recognizes, "[M]arket forces alone are unlikely to ensure that the unserved minority of Americans will be able to obtain the benefits of broadband anytime in the near future."[32] Nevertheless, the NPRM makes the unsupported assumption that lowering infrastructure costs for broadband service providers – costs that will have to be borne by electric consumers whether or not they ever are offered broadband service – will spur greater deployment.

NRECA strongly disagrees and its survey data disproves the NPRM's assumption. Moreover, NRECA doubts that any savings realized through the NPRM's proposed pole attachment rate decreases will be used by service providers to fund further broadband deployment to high cost rural areas or be passed on directly to consumers, a mere hope expressed in the National Broadband Plan.[33] If the Commission truly hopes to achieve universal deployment of broadband services, the Commission needs to adopt a more appropriate mechanism that will, in fact, guarantee not just the initial broadband deployment, but the viability of continuing broadband service in areas lacking population density. The Commission has considerable experience with the USF program that is specifically designed to address high-cost areas in the telephone service arena. The USF program, however, does not shift costs from

[30] National Broadband Plan at 37.
[31] Id. at 39.
[32] 706 Report at ¶28.
[33] National Broadband Plan at 110 ("If the lower rates were applied, and if the cost differential in excess of $8 per month were passed on to consumers, *the typical monthly price of broadband for some rural consumers could fall materially*." Emphasis added.)

one industry's consumers (the telecommunications industry) to another (the utility industry). This is why NRECA has repeatedly encouraged the Commission to explore appropriate reforms of the USF to support broadband deployments.[34]

B. The FCC's current rates formulas do not provide for full cost recovery.

Electric Cooperatives set pole attachment rates giving due consideration to their need to maintain their status as cooperatives under state cooperative law and their exempt status under federal income tax law. Most state cooperative laws under which Electric Cooperatives are organized contain provisions that expressly require "nonprofit" operation for the mutual benefit of members. To become and remain a qualified "cooperative" under federal tax law, an electric cooperative must operate "at cost."[35] Electric Cooperatives, must, therefore, neither operate "for profit [n]or below cost."[36] To protect an Electric Co-op's status as a "cooperative" under federal tax law, any attacher should fully compensate the Electric Cooperative for the use of its poles or other infrastructure or right-of-way. As a result, Electric Cooperatives charge cost-based pole attachment rates, rates that as NRECA discussed above, are derived using a variety of cost-based rate methodologies, but which all generate reasonable rates. While some Electric Cooperatives

[34] *See, e.g.,* Comments of National Rural Electric Cooperative Association, Docket No. 09-51 (filed June 8, 2009) at 9; Letter from Gloria Tristani to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-51(Aug. 19, 2010) Attachment at 1; Letter from Gloria Tristani to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-51 (Sep. 29, 2010) Attachment at 27; Letter from David Predmore to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-47, 09-51, 09-137, WC Docket No. 07-245 (Feb. 19, 2010) Attachment at 4;. Letter from David Predmore to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-47, 09-51, 09-137, WC Docket No. 07-245 (Feb. 26, 2010) Attachment at 4;.Letter from David Predmore to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-47, 09-51, 09-137, WC Docket No. 07-245 (Mar. 9, 2010) Attachment at 4.

[35] *Puget Sound Plywood, Inc. v. Commissioner*, 44 T.C. 305, 308 (1965), acq., 1966-1 C.B. 3; *Buckeye Power, Inc. v. United States*, 38 Fed. Cl. 154 (Fed. Cl. 1997); I.R.S. Announcement 96-24 § (12)22.2(3)(d), 1996-16 I.R.B. 35 (1996); and Michael Seto and Cheryl Chasin, *General Survey of I.R.C. 501(c)(12) Cooperatives and Examination of Current Issues § 7(B), Exempt Organizations Continuing Professional Education Technical Instruction Program for FY 2002* (Oct. 2001).

[36] I.R.S. Announcement 96-24, supra, and Seto, supra.

voluntarily adopt the FCC's existing formulas[37], most do not because they want to use rate methodologies that better assure full cost recovery.

NRECA agrees with the Coalition[38] that neither the FCC's current cable nor telecommunications pole attachment rate formulas fairly or fully compensates electric utilities for the costs associated with pole attachments. Presently, electric utilities bear the entire cost and burden of building and maintaining their pole distribution systems. Utilities incur additional costs solely because another entity seeks to attach to the electric distribution poles. NRECA urges the Commission to abandon the NPRM's rate proposals that only seek to enhance the current subsidies enjoyed by CATV and telecommunications attachers. All of the costs associated with pole ownership and maintenance should be fully allocated equally among all those who benefit from the use of the utility's poles.

C. The NPRM's rate proposals have not taken into consideration additional expenses incurred by utilities in leasing space on their poles.

There are a number of "hidden" costs to utilities associated with allowing other entities to lease space on utility poles that the Commission should recognize. As noted above, the NPRM is overly focused on lowering attachers' costs but sees no need to address shortcomings of its current pole attachment regulatory regime that exist for utilities. The hidden costs to utilities are costs that may be hard to quantify or simply are not routinely tracked by utilities, but they are still very real. NRECA sought to document some of these costs in its member survey. As noted above, 33% of Electric Cooperatives that responded to the survey reported experiencing safety-related accidents caused by pole attachments. Of these Electric Cooperatives, 113 provided specific information on the types of negative impacts that resulted from such accidents:

[37] Some Electric Co-ops use the FCC's formulas to avoid protracted and contentious agreements with attachers.

[38] *See* Comments of the Coalition of Concerned Utilities, WC Docket No. 07-245, RM-11293, RM-11303 (filed Mar. 7, 2008) at III(A)(1).

- 66% of Electric Cooperatives reported that the pole attachment-related accidents generated negative publicity for the cooperative (though it was an attachment to the pole and not the cooperative's infrastructure that caused the accident);
- 28% responded that they had to incur court costs and attorneys fees associated with litigation arising out of the accidents;
- 23% reported power disruptions caused by the accidents; and
- 21% reported that their property and casualty insurance rates were increased due to the accidents.

NRECA describes other troubling practices of attaching entities below that also add costs to utilities that are often not reimbursed. NRECA encourages the Commission to explore what mechanisms might exist to help ensure that utilities are fairly reimbursed for these costs.

D. The Commission lacks authority to forebear and require that the "cable rate" be charged.

The NPRM asks (at ¶ 142 & n. 384) whether the Commission could accomplish its goal of lowering pole attachment rates and making them more uniform by "forbear[ing] from applying the [higher] Section 224(e) telecom rate, and adopt a different rate – such as the cable rate – pursuant to Section 224(b)." The answer is no.

By its terms, the forbearance provision of the Act, Section 10, only permits the Commission to forbear "from applying any regulation or any provision of the Act *to a telecommunications carrier or telecommunications services, or class of telecommunications carriers or telecommunications services*."[39] The telecommunications pole attachment rate provisions of Section 224(e) apply to rates charged by "utilities," *not* "telecommunications carriers" or "telecommunications services," and impose pole attachment rate regulations on

[39] 47 U.S.C. § 160(a). (Emphasis added.)

"utilities," *not* "telecommunications carriers" or "telecommunications services."

Moreover, the NPRM's forbearance proposal would stand Section 10 on its head. The whole purpose of Section 10 is to forbear from regulation where competitive market conditions remove the need for regulation.[40] The Commission may not, under the guise of deregulatory forbearance, construe Section 10 to empower it to impose *increased* regulatory oversight, and stricter rate regulation, on anyone, much less on utilities that are not even subject to Section 10.

IV. OTHER CONCERNS OF UTILITIES WITH TELECOMMUNICATIONS AND CATV PROVIDER DEPLOYMENTS.

NRECA would like to bring to the Commission's attention certain troubling practices by telecommunications and CATV providers when they attach to utility poles or install underground facilities near pole lines. To our knowledge, these specific practices have not been raised before and merit the Commission's attention. In addition to the unauthorized attachments and unsafe attachments that are discussed above, other attachment practices and uses of utility right-of-way have real and troublesome consequences for pole owners. Following are just a few examples of such practices. The first set of photographs show telecommunications pedestals located within mere inches of the electric utility pole. The close proximity of these pedestals necessitates that a utility excavate by hand to avoid causing damage to the telecommunications equipment, rather than the mechanical means of excavation that the utility would normally use. Such practices impede a utility's work, adding considerable cost and delay to routine pole line maintenance. By locating pedestals in this fashion, the pedestal owner can also gain a "free ride" by tapping into the utility's grounding system, rather than installing its own grounding system for the telecommunications equipment.

[40] *See* 47 U.S.C. § 160(b).

These photographs provided by the Kansas Electric Cooperative Association show communications pedestals installed very close to distribution poles:

This photo provided by Rural Electric Cooperative, Inc. of Lindsay, Oklahoma shows a fiber optic line installed mere inches from a pole. Communications facilities should not be installed in such close proximity without, at the very least, prior notice to the utility. Whenever soil around a pole is disturbed, it must be properly compacted to avoid water seepage, which can cause poles to rot.

Conclusion

The Commission's NPRM rests on a fundamental, underlying contradiction. It seeks to impose new, burdensome pole attachment process obligations on utilities that will increase their costs while, at the same time, seeking to lower utilities' pole attachment rates. In so doing, the NPRM improperly seeks to shift broadband deployment costs from broadband providers to utility ratepayers.

If the Commission nevertheless decides to proceed with making any changes to the pole attachment rules, it should: (1) provide much greater flexibility in the make-ready, installation and contracting processes than the NPRM proposes; (2) permit the imposition of penalties on attachers for unauthorized attachments; and (3) recognize and prohibit additional attachment practices that endanger the public and needlessly add to utilities' costs. The Commission should not adopt the NPRM's proposals concerning compensatory damages, nor should it adopt the NPRM's proposals concerning revisions to the pole rate formulas.

Respectfully submitted,

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August 16, 2010